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No. 96-1128

In the

Supreme Court of the United States

October Term, 1996

ALLIANCE AGAINST IFQS, *et al.*,

Petitioners,

vs.

RONALD H. BROWN, Secretary of Commerce, *et al.*,

Respondents,

and

PETER M. KNUTSEN, *et al.*,

Intervenor - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AND APPENDIX OF THE INTERVENOR-RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. When a statute creates a committee to prepare recommendations for the Secretary of Commerce but empowers the Secretary to accept or reject those recommendations, is the final agency action which is subject to judicial review the decision of the Secretary of Commerce or the decision of the advisory committee.

2. When a statute provides that the applicable standard of judicial review is the arbitrary and capricious standard, should a court nevertheless apply a less deferential standard when (a) an advisory committee to the Secretary of Commerce is comprised in part of individuals who are interested parties and (b) the statute requires that those individuals be interested parties.

LIST OF ALL PARTIES TO THE PROCEEDING, PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

The caption of the case contains the names of all parties. All Intervenor-Respondents are individuals. No Intervenor-Respondent is a corporation.

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No. 96-1128

In the

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ALLIANCE AGAINST IFQS; LADY BLACKIE, INC.; MAKO HAGGERTY; MATHEW DONOHOE; NANCY L. LANDE; ADRIAN LECORNU; HOWARD CARLOUGH; JERE MURRAY; PAUL K. SEATON; WILLIAM SULLIVAN; DON HALL;

Petitioners,

vs.

RONALD H. BROWN, Secretary of Commerce; CLARENCE B. PAUTZKE, Executive Director North Pacific Fisheries Management Council; WESTERN ALASKA FISHERIES DEVELOPMENT ASSOCIATION;

Respondents,

and

PETER M. KNUTSEN; EDWIN FUGLVOG; ROBERT J. WURM; ANDREW SCALZI; NANCY PHILLIPS, et al.;

Intervenor - Respondents.

BRIEF AND APPENDIX OF THE INTERVENOR-RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. INTRODUCTION AND SUMMARY

Intervenor-Respondents Peter M. Knutsen, *et al.*, urge this Court to deny the Petition for a Writ of Certiorari ("Petition") because:

(1) the Petition presents certain arguments never raised below,

(2) the Petition presents no issue in which there is a conflict among the courts of appeal, and,

(3) the Petition does not present an important issue compelling action by this Court because both the standard of judicial review and the interpretation of the underlying statute proposed in the Petition have been rejected by every court which has considered the issue.

II. STATEMENT OF FACTS

The statement of facts by the Alliance Against IFQs ("Alliance") fails to explain the structure of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act").[1] To manage the ocean fishery resources under United States jurisdiction, the Magnuson-Stevens Act divides the United States into eight geographic regions and creates a Regional Fishery Management Council ("Council") for each region.[2]

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1 16 U.S.C. 1801 *et. seq.*

2 16 U.S.C. 1852(a)(1), Appendix 1.

Each Council is to recommend to the Secretary of Commerce ("Secretary") management measures for each fishery in its region which requires conservation and management.[3] If the Secretary approves the management measures, the Secretary implements the management plan by regulation.[4] If the Secretary disapproves the management measures, the Secretary returns the plan to the Council for revision.[5]

The voting members of each Council are the appropriate regional director of the U.S. National Marine Fisheries Service ("NMFS"), the principal state official with marine fisheries management responsibility for each coastal state in the Council's region, and individuals appointed by the Secretary who are knowledgeable regarding the management, conservation or harvest of fishery resources by reason of their active participation or other experience in the fishery.[6]

The Individual Fishing Quota ("IFQ") Plan for the Fixed Gear Sablefish and Halibut Fisheries ("IFQ Plan") was initially developed by the North Pacific Fishery Management Council ("North Pacific Council"). The IFQ Plan has two components, one governing sablefish and one governing halibut. Each was approved by the Secretary under a different statute. The IFQ Plan for sablefish was approved

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3 16 U.S.C. 1852(h)(1), Appendix 2.

4 16 U.S.C. 1854(a)(1), (3) and (4), Appendix 3.

5 *Id.*

6 16 U.S.C. 1852(b)(1), (2) and (5), Appendix 4.

under the Magnuson-Stevens Act. The IFQ Plan as it relates to halibut was approved under the Northern Pacific Halibut Act ("Halibut Act").[7]

Although Alliance omits from its statement of facts any discussion of the important reasons why the IFQ Plan was adopted: to prevent overfishing, to reduce overcapitalization, to stop wasteful fishing practices, and to end fatalities in the fishery; Alliance implies that Congress disapproved of the IFQ Plan when it passed the Sustainable Fisheries Act in 1996.[8] Any such implication is wrong. The specific reference to the IFQ Plan in the Sustainable Fisheries Act provides that the general prohibition on adopting any new IFQ proposal until October 1, 2000 should not be construed as prohibiting amendments to the IFQ Plan.[9] The Sustainable Fisheries Act also provided that nothing in that Act shall be construed to require a reallocation of IFQs.[10] Neither provision implies disapproval of the IFQ Plan. In fact, by exempting the IFQ Plan, these provisions imply approval of the IFQ Plan.

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7 16 U.S.C. 773c(c), Petition Appendix E.

8 Petition at 6 n.2

9 P.L. 104-297, Section 108(e), 110 Stat. 3576-77, Appendix 5.

10 Public Law 104-297, Section 108(i), 110 Stat. 3581, Appendix 5.

III. ARGUMENT

A. ALLIANCE CANNOT RAISE ARGUMENTS FOR THE FIRST TIME IN A PETITION FOR A WRIT OF CERTIORARI.

Nowhere before the District Court or the Court of Appeals did Alliance allege it would be denied procedural due process unless the court adopted a different standard of review.[11] Nor did Alliance's Petition for Rehearing and Suggestion of Rehearing En Banc present this issue.[12] Alliance is precluded from presenting arguments for the first time to this Court.[13]

It is also significant that the first question Alliance presents for review to this Court is discussed nowhere else in the Petition.

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[11] Brief of Points and Authorities in Support of the Alliance Against IFQs' Motion for Summary Judgment at 14-16, Appendix 6; Plaintiff Alliance Against IFQs Consolidated Reply to Defendants' and Intervenors' Oppositions to Plaintiffs' Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment and Plaintiffs' Opposition to Defendants' and Intervenors' Cross-Motions for Summary Judgment at 2-4, Appendix 7; Brief of Plaintiffs-Appellants Alliance Against IFQs *et. al*, at 7-9, Appendix 8; and Reply to Brief of Federal Appellees, to Brief of Intervenor-Defendant-Appellees Peter M. Knutsen, *et. al.*, to Brief of Intervenor-Defendant-Appellee Western Alaska Fisheries Development Association and to Response to the Amicus Curiae Brief of Trustees for Alaska at 2-6, Appendix 9.

[12] Petition for Rehearing and Suggestion of Rehearing En Banc at 13-15, Appendix 10.

[13] *Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983); *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 147 n.2 (1970).

B. THE COURT BELOW APPLIED THE CORRECT STANDARD OF REVIEW.

The appropriate standard of judicial review under the Magnuson-Stevens Act, the "arbitrary and capricious test" of Section 706(2)(A) of the Administrative Procedure Act, is found in the Magnuson-Stevens Act itself.[14] The Halibut Act does not explicitly reference Section 706(2)(A), but, as Alliance has conceded, that standard of review applies under the Halibut Act.[15]

Pursuant to that standard, actions taken by the Secretary in exercising his or her fisheries management authority are subject to limited judicial review,[16] the court may only examine whether there is a rational basis for the agency's decision evidenced in the record and must be wary not to substitute its judgment for that of the Secretary.[17] The

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[14] 16 U.S.C. 1855(f)(1), Appendix 11.

[15] Brief of Points and Authorities in Support of the Alliance Against IFQs' Motion for Summary Judgment at 14-15, Appendix 6.

[16] *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1441 (9th Cir. 1991); see also, *Alaska Factory Trawlers Ass'n v. Baldridge*, 831 F.2d at 1460; *Maine v. Kreps*, 563 F.2d 1052, 1055 (1st Cir. 1977); *Southeastern Fisheries Ass'n, Inc. v. Mosbacher*, 773 F. Supp. 435, 439 (D.D.C. 1991), *aff'd* 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 2546, 135 L.Ed.2d 1066 (1996); *Louisiana v. Baldridge*, 538 F. Supp. 625, 628 (E.D. La. 1982); *Associated Vessels Services, Inc. v. Verity*, 688 F. Supp. 13, 17 (D.D.C. 1988).

[17] *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d at 1441; *see also, Alaska Factory Trawlers Association v.*

Footnote continued next page.

plaintiff bears the burden under this standard of judicial review,[18] which burden cannot be sustained by weighing the evidence in the record pro and con.[19] To the contrary, the plaintiff must show "that the record is devoid of reasonable evidence that would support the agency's decision."[20]

Alliance recognizes the District Court conducted its review in accordance with these standards.[21] Alliance also recognizes that the United States Court of Appeals for the Ninth Circuit correctly set forth the proper standard.[22]

Baldridge, 831 F.2d 1456, 1460 (9th Cir. 1987); *Northwest Environmental Defense Center v. Brennen*, 958 F.2d 930, 934 (9th Cir. 1992); *Organized Fishermen of Florida, Inc. v. Franklin*, 846 F. Supp. 1569, 1573 (S.D. Fla. 1994); *Parravano v. Babbitt*, 837 F. Supp. 1034, 1042 (N.D. Cal. 1993); *Southeastern Fisheries Ass'n, Inc. v. Mosbacher*, 773 F. Supp. at 439, *aff'd* 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 2546, 135 L.Ed.2d 1066 (1996); *Louisiana v. Baldridge*, 538 F. Supp. at 628; *Maine v. Kreps*, 563 F.2d at 1055; *C&W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1562 (D.C. Cir. 1991).

[18] *Organized Fishermen of Florida, Inc. v. Franklin*, 846 F. Supp. at 1573; *United Boatmen of New Jersey v. Mosbacher*, 1992 U.S. Dist. LEXIS 664 (D.N.J. 1992).

[19] *State of Louisiana v. Verity*, 853 F.2d 322, 327 (5th Cir. 1988).

[20] *Organized Fishermen of Florida, Inc. v. Franklin*, 846 F. Supp. at 1573; *see also, State of Louisiana v. Verity*, 853 F.2d at 327 (an agency's decision "need not be ideal, so long as...the agency gave at least minimal consideration to relevant facts contained in the record.")

[21] Brief of Plaintiff-Appellants Alliance Against IFQs, et al. at 7, Appendix 8.

[22] *Id.*

Nevertheless, Alliance argues for the first time that the arbitrary and capricious standard of the Administrative Procedure Act somehow violates the due process clause of the United States Constitution.

The Petition is devoid of any citation to precedent supporting this argument which Alliance itself characterizes as "novel."[23] The arbitrary and capricious test is settled law and has been accepted as the appropriate standard by which to judge agency action by every court reviewing a fishery management measure.[24]

To salvage its argument, Alliance argues the arbitrary and capricious standard defers too much to the Secretary. According to Alliance, the problem is that the Secretary reviewed and approved the draft IFQ Plan prepared by the North Pacific Council, and therefore, the North Pacific Council's actions are really what is at issue.[25] Alliance's attempt to focus on the North Pacific Council's action ignores the fact that a Council's actions are not reviewable. It is the Secretary's action in implementing regulations, not the Council's actions in recommending a management plan to

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23 Petition at 9.

24 *See* notes 16-20 *supra*.

25 Petition at 11-12.

the Secretary, which is reviewable.[26] The Secretary's action is the final agency action. Alliance even seems to concede that point in its statement of the Questions Presented for Review where Alliance admits the North Pacific Council only "proposed" management measures to the Secretary.[27]

These rulings are consistent with the Magnuson-Stevens Act which specifies: "Regulations promulgated by the Secretary under this Act ... shall be subject to judicial review...."[28] No provision is made for judicial review of a Council's recommendation to the Secretary.

Nevertheless, Alliance argues that some members of the North Pacific Council were active participants, and had financial interests, in the fisheries. Alliance concludes that this circumstance precludes use of the arbitrary and capricious standard of review and requires the courts to treat the Council, not the Secretary, as the decisionmaker.

Not only are several links missing from Alliance's legal argument, but Alliance overlooks certain facts. Although Alliance alleges conflicts of interest among some

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26 *Alaska Factory Trawler Association v. Baldridge*, 831 F.2d at 1460, 1464; *Louisiana v. Baldridge*, 538 F. Supp. at 630 n. 1; *National Fisheries Institute v. Mosbacher*, 732 F. Supp. 210, 217 (D.D.C. 1990); *Associated Vessel Services, Inc. v. Verity*, 688 F. Supp. at 16; *Washington Trollers Association v. Kreps*, 466 F. Supp. 309, 312 (W.D. Wash. 1979), *rev'd on other grounds*, 645 F.2d 684 (9th Cir. 1981).

27 Petition at (i).

28 16 U.S.C. 1854(f)(1), Appendix 11.

North Pacific Council members, Alliance forgets that before the District Court Alliance admitted there was no suggestion of "unprincipled behavior" by members of the North Pacific Council.[29]

Alliance also ignores the structure of the Magnuson-Stevens Act which requires that Council members "be individuals who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable" about fisheries management issues.[30] In appointing Council members, the Secretary is to "ensure a fair and balanced apportionment...of the active participants (or their representatives) in the commercial and recreational fisheries" under the Council's jurisdiction.[31] Furthermore, no individual is eligible for appointment until he or she complies with financial interest disclosure requirements.[32] Finally, if a sitting Council member fails to provide the required financial interest disclosures, the participation of that person in a Council action "during any time that individual is not in compliance...may not be treated as cause

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29 Consolidated Reply to Defendants' and Intervenors' Oppositions to Plaintiffs' Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment and Plaintiffs' Opposition to Defendants' and Intervenors' Cross-Motions for Summary Judgment at 6-7, Appendix 12.

30 16 U.S.C. 1852(b)(2)(A), Appendix 4. (Emphasis added.)

31 16 U.S.C. 1852(b)(2)(B), Appendix 4.

32 16 U.S.C. 1852(b)(2)(C), Appendix 4.

for the invalidation of that action."[33] While Alliance complains that North Pacific Council members were fishermen, Alliance forgets that Congress has explicitly provided for the appointment of Council members who are active participants in the regulated fisheries.

Nevertheless, Alliance cites *Withrow v. Larkin*[34] for the proposition that biased decisionmaking is improper. Although Alliance recognizes the distinction between agency adjudication and rulemaking, Alliance asserts it is of no impact. To the contrary, rulemaking requires interested and informed decisionmakers and rulemaking procedures are not held to the same standards as adjudicatory proceedings[35] --- particularly when Congress has mandated the participation of interested parties.

C. THE REGULATION IMPLEMENTING THE IFQ PLAN DOES NOT VIOLATE ANY STATUTORY MANDATE

1. The Secretary Complied With The Requirement That Allocations Be Fair and Equitable.

Alliance argues that the IFQ Plan violated that portion of the Magnuson-Stevens Act and the Halibut Act

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33 16 U.S.C. 1852(j)(6), Appendix 13.

34 421 U.S. 35 (1975), Petition at 10.

35 *Harry & Bryant Co. v. FTC*, 726 F.2d 993, 998-99 (4th Cir. 1984), *cert. denied*, 469 U.S. 820 (1984).

providing that an allocation must be fair and equitable to "all [U.S.] fishermen."[36] Alliance asserts the IFQ Plan is not fair and equitable to "all" fishermen because the IFQ Plan did not make crew and skippers eligible for an initial allocation of quota shares ("QS")[37], although crew members and skippers could purchase QS after the initial allocation. Alliance's argument appears to be that an IFQ plan fails the fair and equitable requirement unless every class of participants in the fishery has some part of the pie when it is first divided.

Alliance's argument has been rejected in the regulations implementing the Magnuson-Stevens Act and the Halibut Act and by every court which has considered Alliance's argument. The regulations explaining the fair and equitable standard state that "inherent in an allocation is the advantaging of one group to the detriment of another."[38] The regulations also provide that an allocation "may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups."[39] Courts have uniformly held that if a Fishery Management Plan ("FMP") has positive net benefits, the allocation will satisfy the fair

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36 Petition at 17-18.

37 A quota share is a percentage which, when applied to the annual allowable harvest, results in an IFQ.

38 50 C.F.R. 602.14(c)(3)(i)(A), Appendix 14.

39 50 C.F.R. 602.14(c)(3)(i)(B), Appendix 15.

and equitable requirement even if it eliminates individuals or an entire user group from the fishery.[40] When the United States Court of Appeals for the Ninth Circuit rejected Alliance's argument it was in accord with uniform judicial precedents.

Alliance's attempt to argue that the court below actually found the IFQ Plan violated the fair and equitable standard is not fully consistent with the court's decision. The court stated that allocating all IFQ shares to owners and lessees, and none to crew, appeared to violate "the statutory command of fairness and equity to 'all' fishermen."[41] But with its next breath the court found the fair and equitable standard cannot be considered in isolation from other standards governing approval of FMPs and that these various standards have competing and conflicting objectives.[42] The

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40 *Alaska Factory Trawler Association v. Baldridge*, 831 F.2d at 1460 (FMP excluded pot fishermen and trawlers from the fishery); *National Fisheries Institute v. Mosbacher*, 732 F. Supp. at 225-26 (commercial fishermen excluded from the Atlantic Ocean and Gulf of Mexico billfish fishery); *C&W Fish Company v. Fox*, 931 F.2d 1556, 1563-64 (D.C. Cir. 1991) (drift gillnet fishermen banned from the Atlantic king mackerel and coastal pelagic fishery); *Sea Watch International v. Mosbacher*, 762 F. Supp. 370, 378 (D.D.C. 1991) (challenge to an individual fishing quota plan based on allegations that it would drive single vessel owners and small fleet owners from the fishery rejected because inherent in an allocation is the advantaging of one group to the detriment of another).

41 *Alliance Against IFQs v. Brown*, 84 F.3d 343, 348 (9th Cir. 1996).

42 *Id.* at 348-349.

court stated the Secretary's duty is not only to be fair and equitable but also to prevent overfishing, promote conservation, promote efficiency, minimize costs, and achieve other criteria.[43] The court concluded there is a tension and inconsistency among these objectives which "necessarily requires that each goal be sacrificed to some extent to meeting the others."[44]

The court then quoted that portion of the regulations providing that an allocation of fishing privileges may impose a hardship on one group if it is outweighed by the plan's total benefits[45] and rejected Alliance's argument stating:

> The Secretary is allowed ... to sacrifice the interests of some groups of fishermen, for the benefit as the Secretary sees it of the fishery as a whole.[46]

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43 *Id.*

44 *Id.* at 349.

45 *Id.* at 349-350.

46 *Id.* at 350, citing *Alaska Factory Trawlers Ass'n v. Baldridge*, 831 F.2d at 1460. The court's view that the standards governing approval of FMPs have competing objectives which require balancing was validated in the legislative history of the Sustainable Fisheries Act. The Senate Report explaining an amendment to one such standard states:

> The goal of this amendment is not to eliminate efficiency as a consideration in the development of plans and regulations, but rather to ensure that it is balanced with the requirements of other national standards.

Footnote continued next page.

Finally, the court found the Secretary was neither arbitrary nor capricious in determining that the overall benefit to the fishery as a whole justified the IFQ Plan.[47] Nowhere does the Petition challenge the finding that the overall benefits of the IFQ Plan outweigh any detriment which may occur to individual participants. Moreover, Alliance's claim that crew members and skippers are "barred" from the IFQ fishery is wrong.[48] The IFQ Plan permits crew members to purchase quota shares.[49] In fact, only crew members and initial catcher vessel QS recipients are eligible to purchase catcher vessel QS.[50] Furthermore, the IFQ Plan allows crew-owned catcher vessel QS to be used on a freezer vessel which enhances opportunities for crew members to purchase and use QS.[51] Alliance also ignores the fact that one of the purposes of the IFQ Plan was to reduce overcapitalization in the fishery and that crew members and skippers, unlike owners and leaseholders who were eligible for initial QS, do not provide the capital or make the decisions by which vessels enter or exit the fishery.[52]

S. Rep. No. 276, 104th Cong., 2d Sess., at 13.

47 *Alliance Against IFQs v. Brown*, 84 F.3d at 350.

48 Petition at 5.

49 50 C.F.R. 676.21(b), Petition Exhibit K at 271a.

50 *Id.*

51 57 Fed. Reg. 57139 (Dec. 3, 1992), Appendix 16.

52 58 Fed. Reg. 59375, 59380 (Nov. 9, 1993), Petition Exhibit K at 98a-100a; see also 58 Fed. Reg. at 59385 (comment 11), Petition Exhibit K at 129a-131a.

2. The Secretary Complied With The Requirement To Consider Present Participation In The Fishery.

Alliance next argues that when the Secretary implemented the IFQ Plan the Secretary failed to consider the present participation of crew members and skippers. Again, Alliance bases its argument on the fact that crew members and skippers were not eligible to receive initial QS unless they were also vessel owners or leaseholders.[53]

Section 303(b)(6) of the Magnuson-Stevens Act provides that in developing a limited access system the Council and the Secretary shall "take into account" several factors including present participation in the fishery.[54] The Halibut Act provides that any limited access system established under that Act "shall be consistent with the limited entry criteria set forth in section 1853(b)(6) of [the Magnuson-Stevens Act]."[55]

For purposes of Section 303(b)(6), "take into account" means only that the factors be considered.[56]

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53 Petition at 20.

54 16 U.S.C. 1853(b)(6), Petition Appendix G.

55 16 U.S.C. 773c(c), Petition Appendix E.

56 *Pacific Coast Fed'n of Fishermen's Ass'n. v. Secretary of Commerce*, 494 F. Supp. 626, 631 (N.D. Cal. 1980), *citing* H.R. Rep. No. 445, 94th Cong., 2d Sess. 66, reprinted in 1976 U.S. Code Cong. & Admin. News, pp. 593, 634-35.

Curiously, the brief submitted by the Alliance to the District Court explained, in part, the reasoning used by the North Pacific Council and the Secretary in making their decisions.[57] Alliance may disagree with the Secretary's conclusions, but Alliance itself documents that the Section 303(b)(6) factors were considered, thus satisfying the appropriate legal standard.

The preamble to the final rule implementing the IFQ Plan also demonstrates the Section 303(b)(6) standard was met. The preamble devotes over nine columns of text to discussing Section 303(b)(6) issues, including the participation of crew members and skippers and the reasons for the decisions regarding crew members and skippers.[58] Alliance's attempt to argue the Secretary did not consider all the relevant present participation issues is fatally flawed.

The United States Court of Appeals for the Ninth Circuit dealt with this issue as part of its discussion of the fair and equitable issue. The court found the Secretary had in fact considered the interests of crew members[59] but had reasonably determined that to reduce overcapitalization in

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[57] Brief of Points and Authorities in Support of Alliance Against IFQs' Motion for Summary Judgment at 65-67, Appendix 17.

[58] 58 Fed. Reg. at 59379-59381, 59383 (Comment 3), 59385-86 (Comments 10-14) and 59394 (Comment 60); Petition Exhibit K at 95a-100a, 119a-120a, 128a-137a, and 182a-184a.

[59] *Alliance Against IFQs v. Brown*, 84 F.3d at 350.

the fishery it was necessary to allocate IFQs to the individuals who decided whether a vessel would participate in the fishery, *i.e.*, vessel owners and leaseholders.[60]

After focusing on crew and skippers specifically, Alliance makes a second present participation argument which is that neither the North Pacific Council nor the Secretary considered the present participation of fishermen generally because the IFQ Plan sets 1990 as the last qualifying year for QS eligibility. Alliance finds fault because a person who fished continuously from 1991 through 1995, when the IFQ Plan was implemented would not qualify for QS.[61]

The Administrative Record demonstrates this aspect of Alliance's present participation argument was fully evaluated and considered, thereby satisfying Section 303(b)(6). As explained in the Final Supplemental Environmental Impact Statement/Environmental Impact Statement and the preamble to the final rule implementing the IFQ Plan, extending the qualifying period beyond 1990 would have provided an incentive for additional people to enter the fishery, and for previous entrants to adopt extreme fishing practices to increase their overall share of "historical"

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60 *Id.* at 349.

61 Petition at 19-20.

landings.[62] Either event would have exacerbated the conservation and overcapitalization problems the IFQ Plan sought to solve.[63] Not only does the record demonstrate that the present participation issue was considered but even Alliance recognizes "some cut-off date is not unreasonable."[64] Moreover, when the North Pacific Council recommend the IFQ Plan to the Secretary in December 1991 the most recent year for which complete data was available was 1990.[65]

Alliance claims to find support for its position in *Sea Watch Int'l v. Mosbacher*[66] where the court upheld a limited access system against a challenge based on an alleged failure to consider present participation. Alliance notes the cut-off date for eligibility in the *Sea Watch* limited access plan was two years before the plan was implemented. Alliance misses

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62 Final Supplemental Environmental Impact Statement/Environmental Impact Statement for the Individual Fishing Quota Management Alternative for Fixed Gear Sablefish and Halibut Fisheries, Gulf of Alaska and Bering Sea/Aleutian Islands, September 15, 1992, at 2-23, Appendix 18; 58 Fed. Reg. at 59380, Petition Exhibit K at 98a-99a.

63 58 Fed. Reg. at 59386 (comment 12), Petition Exhibit K at 132a-133a.

64 Petition at 21.

65 58 Fed. Reg. at 59386 (comment 12), Petition Exhibit K at 132a-133a.

66 762 F. Supp. 370 (D.D.C. 1991)

two central points. First, the court did not say cut-off dates more than two years old were automatically invalid. Second, the *Sea Watch* court did say:

> As long the Council and the Secretary took [the Section 303(b)(6) factors] into account, the Court may not second-guess the accuracy of the balance struck.[67]

Here, the Secretary and the North Pacific Council clearly considered and rejected Alliance's argument, striking a balance in favor of not encouraging more entrants into fisheries which already had too many participants.

In considering Alliance's present participation argument, the United States Court of Appeals for the Ninth Circuit found the Secretary reasonably concluded that allowing later entrants to be eligible for QS would have encouraged the speculative overinvestment and overfishing which the IFQ Plan was intended to restrain.[68] The court thus rejected Alliance's contention that the administrative delay in implementing the plan meant present participation was not considered.

The court also noted the participation considered by the North Pacific Council was roughly present participation when the Secretary issued proposed regulations

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67 *Id.* at 379.

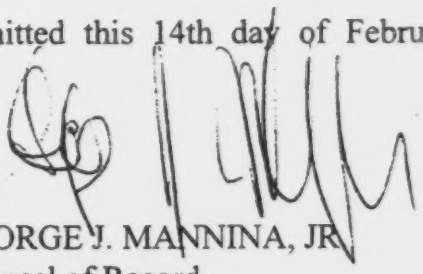
68 *Alliance Against IFQs v. Brown*, 84 F.3d at 347-348.

implementing the IFQ Plan. The court pointed out that the process of moving from proposed to final regulations can require substantial amounts of time and, therefore, the word "present" cannot prudently be contemporaneous with the promulgation of final regulations.[69]

IV. CONCLUSION

Alliance's Petition should be denied because (1) it presents certain issues for decision which were not raised below, (2) there is no conflict among the courts of appeal, and (3) there is no important issue compelling action by this Court because Alliance's requested standard of judicial review and statutory interpretations are incorrect and have been uniformly rejected by courts which have considered the issue.

Respectfully submitted this 14th day of February, 1997.



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69 *Alliance Against IFQs v. Brown*, at 347.

APPENDIX

APPENDIX 1 - 16 U.S.C. 1852(a)(1).

(a)(1) ESTABLISHMENT.--There shall be established, within 120 days after the date of the enactment of this Act, eight Regional Fishery Management Councils, as follows:

. . .

(G) NORTH PACIFIC COUNCIL.--The North Pacific Fishery Management Council shall consist of the States of Alaska, Washington, and Oregon and shall have authority over the fisheries in the Arctic Ocean, Bering Sea and Pacific Ocean seaward of Alaska. The North Pacific Council shall have 11 voting members, including 7 appointed by the Secretary in accordance with subsection (b)(2) (5 of whom shall be appointed from the State of Alaska and 2 of whom shall be appointed from the State of Washington)....

APPENDIX 2 - 16 U.S.C. 1852(h)(1).

(h) FUNCTIONS.--Each Council shall, in accordance with the provisions of this Act--

(1) for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary (A) a fishery management plan, and (B) amendments to each such plan that are necessary from time to time (and promptly whenever changes in conservation and management measures in another fishery substantially affect the fishery for which such plan was developed);....

APPENDIX 3 - 16 U.S.C. 1854(a)(1), (3) and (4).

Section 304. Action by Secretary.

(a) REVIEW OF PLANS.--

(1) Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall--

(A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law; and

(B) immediately publish in the Federal a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published....

(3) The Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council. A notice of disapproval or partial approval shall specify--

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved.

(4) If the Secretary disapproves or partially approves a plan or amendment, the Council may submit a revised plan or amendment to the Secretary for review under this subsection....

APPENDIX 4 - 16 U.S.C. 1852(b)(1), (2) and (5).

(b) VOTING MEMBERS.--

(1) The voting members of each Council shall be:

(A) The principal State official with marine fishery management responsibility and expertise in each constituent State, who is designated as such by the Governor of the State, so long as the official continues to hold such position, or the designee of such official.

(B) The regional director of the National Marine Fisheries Service for the geographic area concerned, or his designee, except that if two such directors are within such geographical area, the Secretary shall designate which of such directors shall be the voting member.

(C) The members required to be appointed by the Secretary in accordance with paragraphs (2) and (5).

(2)(A) The members of each Council required to be appointed by the Secretary must be individuals who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned. Within nine months after the date of enactment of the Fishery Conservation Amendments of 1990, the Secretary

shall, by regulation, prescribe criteria for determining whether an individual satisfies the requirements of this subparagraph.

(B) The Secretary, in making appointments under this section, shall, to the extent practicable, ensure a fair and balanced apportionment, on a rotating or other basis, of the active participants (or their representatives) in the commercial and recreational fisheries under the jurisdiction of the Council....

(C) The Secretary shall appoint the members of each Council from a list of individuals submitted by the Governor of each applicable constituent State. A Governor may not submit the names of individuals to the Secretary for appointment unless the Governor has determined that each such individual is qualified under the requirements of subparagraph (A) and unless the Governor has, to the extent practicable, first consulted with representatives of the commercial and recreational fishing interests of the State regarding those individuals. Each such list shall include the names and pertinent biographical data of not less than three individuals for each applicable vacancy and shall be accompanied by a statement by the Governor explaining how each such individual meets the requirements of subparagraph (A) The Secretary shall review each list submitted by a Governor to ascertain if the individuals on the list are qualified for the vacancy on the basis of such requirements. If the Secretary determines that any individual is not qualified, the Secretary shall notify the appropriate Governor of that determination. The

Governor shall then submit a revised list or resubmit the original list with an additional explanation of the qualifications of the individual in question. An individual is not eligible for appointment by the Secretary until that individual complies with the applicable financial disclosure requirements under subsection (k)....

(5)(A) The Secretary shall appoint to the Pacific Council on representative of an Indian tribe with Federally recognized fishing rights from California, Oregon, Washington, or Idaho from a list of not less than 3 individuals submitted by the tribal governments. The Secretary, in consultation with the Secretary of the Interior and tribal governments, shall establish by regulation the procedure for submitting a list under this subparagraph....

APPENDIX 5 - Sustainable Fisheries Act, P.L. 104-297, Section 108(e), 110 Stat. 3576-77.

(e) INDIVIDUAL FISHING QUOTAS.--Subsection 303 (16 U.S.C. 1853) is amended further by striking subsections (d), (e), and (f), and inserting the following:

"(d) INDIVIDUAL FISHING QUOTAS.--

"(1)(A) A Council may not submit and the Secretary may not approve or implement before October 1, 2000, any fishery management plan, plan amendment, or regulation under this Act which creates a new individual fishing quota program....

"(2)(A) No provision of law shall be construed to limit the authority of a Council to submit and the Secretary to approve the termination or limitation, without compensation to holders of any limited access system permits, of a fishery management plan, plan amendment, or regulation that provides for a limited access system, including an individual fishing quota program...."

(i) EXISTING QUOTA PLANS.--Nothing in this Act or the amendments made by this Act shall be construed to require a reallocation of individual fishing quotas under any individual fishing quota program approved by the Secretary before January 4, 1995.

APPENDIX 6 - Brief of the Points and Authorities In Support Of The Alliance Against IFQs' Motion for Summary Judgment at 14-16, dated June 17, 1994.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALLIANCE AGAINST IFQS, et al. Plaintiffs,	)
v.	) No. A93-480 CV (JKS)
RONALD H. BROWN, Secretary of Commerce, et al., Defendants.	) BRIEF OF THE POINTS) AND AUTHORITIES IN) SUPPORT OF THE) ALLIANCE AGAINST) IFQS' MOTION FOR) SUMMARY JUDGMENT

B. Standard of Review

Actions taken by the Secretary of Commerce under the Magnuson Act and the Halibut Act are subject to judicial review. 16 U.S.C. § 1855(b), 5 U.S.C. § 706. The standard of review under both acts is the same. The Magnuson Act explicitly adopts the judicial review standards found in the Administrative Procedure Act. 16 U.S.C. § 1855(b)(1). The Halibut Act does not contain a specific provision setting out standards for judicial review for challenges to administrative rulemakings and therefore the APA standards apply. Thus, the IFQ rule must be invalidated it if is (1) arbitrary and capricious or an abuse of discretion, (2) unconstitutional, (3) in excess of statutory jurisdiction, or (4) was promulgated without observance of procedure required by law. Id.; 5 U.S.C. § 706(2); see also Northwest Envtl. Defense Ctr. v. Brennan, 958 F.2d 930, 934 (9th Cir. 1992); National Fisheries Inst., Inc. v. Mosbacher, 732 F. Supp. 210, 219 (D.D.C. 1990) (Magnuson Act requires court to apply the traditional APA standard of review).

To determine whether an agency's actions were arbitrary and capricious, a reviewing court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Natural Resources Defense Council, Inc. v. EPA, 790 F.2d 289 (3d Cir. 1986) (EPA regulation designed to enforce Clean Water Act was arbitrary and capricious because agency failed to consider an important aspect of the problem and offered an inadequate explanation for the regulation); Natural Resources Defense Council, Inc. v. EPA, 822 F.2d 104 (D.C. Cir. 1987) (agency rule is

arbitrary and capricious if agency relies upon improper facts, ignores important arguments or fails to articulate reasoned basis for rule).

The reviewing court need not limit its inquiry into the agency's findings of fact. See Washington Ass'n for Television & Children v. FCC, 712 F.2d 677 (D.C. Cir. 1983). It is the function of the reviewing court to searchingly and carefully scrutinize the entire record in order to determine whether the agency's conclusions are draw from the facts. Citizens to Preserve Overton Park, Inc., 401 U.S. at 415. The reviewing court is required to give the agency's action "a thorough, probing, in-depth review." Id.

Moreover, an agency rule is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem." Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1982).[3] "[T]he agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'" Id. at 52 (quoting Burlington Truck Lines); see also Northwest Motorcycle Ass'n v. U.S. Dep't of Agriculture, 18 F.3d 1468 (9th Cir. 1994) (citing cases).

This Court must invalidate the IFQ rule because neither the Council, in developing the FMP, nor the Secretary of Commerce, in reviewing the FMP and promulgating the regulations, considered all of the relevant

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[3] In Motor Vehicle Mfrs., the Supreme Court found that the National Highway Traffic Safety Administration's ("NHTSA's") rescission of a passive restraint regulation was arbitrary and capricious because "NHTSA apparently gave no consideration whatever to modify the Standard to require that airbag technology be utilized." Id. at 46.

factors in arriving at their decisions. As this memorandum demonstrates in the argument below, many central issues were either ignored, superficially considered, or handled in a procedurally defective manner. Because of the many flaws in the analysis and decisions-making process which produced this rule, if cannot be upheld.

APPENDIX 7 - Plaintiff Alliance Against IFQs' Consolidated Reply To Defendants' And Intervenors' Oppositions To Plaintiffs' Motion For Summary Judgment And Plaintiffs' Opposition To Defendants' And Intervenors' Cross-Motions For Summary Judgment at 2-4, dated August 16, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALLIANCE AGAINST IFQS, et al.	) No. A93-480 CV (JKS)
Plaintiffs,	) PLAINTIFF ALLIANCE AGAINST IFQS' CONSOLIDATED REPLY TO DEFENDANTS' AND INTERVENORS' OPPOSITIONS TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' OPPOSITION TO DEFENDANTS' AND INTERVENORS' CROSS-MOTIONS FOR SUMMARY JUDGMENT
v.	
RONALD H. BROWN, Secretary of Commerce, et al.,	
Defendants.	

At the outset, it is important to correct the views of opposing parties as to what result this lawsuit seeks to obtain and the reasons why it was filed. Contrary to Knutsen's concluding statement, the only alternative to the upholding of the IFQ scheme is not a return to the "status quo open access derby style fishery" which has occurred in the past. See, Knutsen Mem. at 85.[2] Federal defendants and Knutsen catalogue a host of ills which have purportedly characterized the sablefish and halibut fisheries, but pose only a straw man alternative (the status quo) to the program actually promulgated. Plaintiffs do not dispute that some serious problems have developed in these fisheries in recent years and do not necessarily advocate a return to the status quo. What they do advocate is a rational and objective evaluation of all factors necessary to assure the legality and effectiveness of whatever management scheme is eventually adopted. Particularly close examination of agency decision-making is necessary here, where the Council conducted the bulk of the analysis and preparation of the IFQ plan. Recent congressional testimony by the Inspector General of the Department of Commerce addressed the question of financial conflicts of interest among regional fishery management councils, including the North Pacific Fishery Management Council. See Testimony of Frank DeGeorge, attached hereto

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2 Throughout this reply brief the memoranda of law filed by the other parties in this case will be referred to as follows: The federal defendants' memorandum of law will be cited as "Def. Mem.", the Knutsen intervenors' memorandum of law will be cited as "Knutsen Mem.", and WAFDA's memorandum of law will be cited as "WAFDA Mem." The plaintiffs' brief in support of their motion for summary judgment will be cited as "Pl. Mem."

as Exhibit A. In examining the Council decision-making process in the inshore/offshore rulemaking, the Inspector General found no evidence that council members made decisions in that situation to maximize their own financial interests, but recommended that federal conflicts of interest laws that apply to other federal operations should be applied to fishery management councils as well.

The Inspector General further noted that the statutory waiver of conflicts of interest rules in the Magnuson Act is the only example of federal law of a direct statutory blanket exemption from the prohibitions against conflicts of interest applying to other federal officials: "In other words, in order to have faith in the decisions being made, the public must perceive that those in charge of approving and implementing a plan are free of direct financial benefits that would influence them to favor individual benefit over the general good." Exhibit A at 4.

Given the Inspector General's concern over the integrity of the Council decision-making process, even in the context of subsequent Secretarial review of fishery management plans, the court may wish to undertake a more searching examination of the agency decision in this matter than would otherwise be the case. The opposing parties' rote invocation of the arbitrary and capricious standard of review should be analyzed in the context of the unique circumstances of fishery management council decision-making. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) (reviewing court is required to give agency's action "a thorough, probing, in-depth review").

APPENDIX 8 - Brief of Plaintiffs - Appellants Alliance Against IFQs, et al., at 7-9, dated April 26, 1995.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 95-35077

ALLIANCE AGAINST IFQS; ET AL.;
Plaintiff - Appellants;
v.
RONALD H. BROWN, Secretary of Commerce; CLARENCE B. PAUTZKE, Executive Director North Pacific Fisheries Management Council; WESTERN ALASKA FISHERIES DEVELOPMENT ASSOCIATION;
Defendants - Appellees;
and
PETER M. KNUTSEN; EDWIN FUGLVOG; ROBERT J. WURM; ANDREW SCALZI; NANCY PHILLIPS; et. al.;
Defendant - Intervenors -Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA
THE HONORABLE JAMES K. SINGLETON, JR., JUDGE

BRIEF OF PLAINTIFFS - APPELLANTS ALLIANCE AGAINST IFQS; ET AL.

A. Standard of Review.

A grant of Summary Judgment is reviewed de novo. The arguments that the Secretary violated the FCMA by changing the port clearance requirement and by failing to hold preemption hearings will be decided based on statutory interpretation. No discretion should be given to the Secretary. Washington Crab Producers v. Mosbacher, 924 F.2d 1438, 1440 (9th Cir. 1991).

The Ninth Circuit has held that it will review administrative actions within the discretion of the Secretary of Commerce under the FCMA only for reasonableness. Id. at 1441. The Alliance asserted below that the reviewing court should give the agency's action a thorough, probing in depth review, because of the unique circumstances of fishery management council decision-making. ER-IV. at 4. However, the District Court based its conclusions on "whether the Secretary has considered the relevant factors and articulated a rational connection between the facts found and the judgments made." ER-VI at 9.

This standard defers too much to the NPFMC as it developed and implemented a plan to privatize a billion dollar fishery, particularly where Council members had direct and indirect financial interest in the outcome.

The Ninth Circuit has recognized a "less deferential" standard of review where an employee benefits plan administrator is operating under a conflict of interest. Atwood v. Newmont Gold Co., 45 F.3d 1317, 1322 (9th Cir. 1995). If the reviewing court determines that self-interest

caused a breach of duty, the court will look "very skeptically" in deferring to the discretion of the administrator. Id. at 1323. The burden of proof shifts to the administrator to show that the conflict of interest did not affect the decision. Id. This Court has recognized that a heightened standard of review may be appropriate where the decision would affect the individual decision-maker financially. Id., citing Fielding v. International Harvesters, 755 F.2d 708 (9th Cir. 1985). Here, a review of the voting on the Alaska halibut and sablefish IFQ plan is enlightening. In the December 1991 final IFQ vote, 6 of the 7 "yes" votes were made by members who had an interest in the outcome.

(1) Bob Alverson, who represented longliners, is executive director of the Fishing Vessel Owner's Association, whose approximately sixty members receive a large portion of these shares.

(2) Joe Blum, who upon leaving the Council immediately became a council lobbyist for American Factory Trawlers Association.

(3) Larry Cotter, a consultant, who upon leaving the Council formed the largest brokerage devoted to the transfer and sales of IFQs.

(4) Ron Hegge, who represented longliners, owns freezer longliners and received IFQs.

(5) Wally Pereyra, who represented the factor trawlers and as a multi-vessel owner. He said he wanted this plan so it would allow him to get trawl IFQs for his factory trawl fleet.

(6) Clem Tillion had been appointed to fill the Alaska State seat. His family members received large IFQ shares. ER-XI, tab 9.

APPENDIX 9 - Reply to Brief of the Federal Appellees, to Brief of Intervenor-Defendant-Appellees Peter M. Knutsen, et al., to Brief of Intervenor-Defendant-Appellee Western Alaska Fisheries Development Association, and to Response to the Amicus Curiae Brief of Trustees for Alaska at 2-6, dated July 11, 1995.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 95-35077

ALLIANCE AGAINST IFQS; et. al.;
Plaintiff - Appellants;
v.
RONALD H. BROWN, Secretary of Commerce; et. al.;
Defendants - Appellees;
and
PETER M. KNUTSEN; et. al.;
Defendant - Intervenors -Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ALASKA
THE HONORABLE JAMES K. SINGLETON, JR., JUDGE

REPLY TO BRIEF OF THE FEDERAL APPELLEES, TO BRIEF OF INTERVENOR-DEFENDANT-APPELLEES PETER M. KNUTSEN, ET AL., TO BRIEF OF INTERVENOR-DEFENDANT-APPELLEE WESTERN ALASKA FISHERIES DEVELOPMENT ASSOCIATION, AND TO RESPONSE TO THE AMICUS CURIAE BRIEF OF TRUSTEES FOR ALASKA

II. Standard of Review.

A. No deference should be accorded the Secretary. Should the Court apply a deferential standard of judicial review, however, there is ample reason to reject the Secretary's acts as unreasonable.

The Government agrees that the Secretary must "take into account" any data, views or comments received. Government's brief at 6. This court must examine the Secretary's review, and neither counsel nor the court can supply or rely on any reasoning that does not appear in the record.[2]

On this point, the Alliance directs this Court's attention to three issues: the addition of the Bellingham port, the allocation of all quota shares ("QS") to vessel owners, and the conflict of interest within the Council.

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2 See American Min. Congress v. U.S.E.P.A., 907 F.2d 1179 (C.A.D.C. 1990) (Deference to agency does not require Court of Appeals to abdicate judicial duty carefully to review record to ascertain that agency has made reasoned decision based on reasoned extrapolations from some reliable evidence to ensure that agency has examined relevant data and articulated satisfactory explanation for its action including rational connection between facts found and choice made); State of Maine v. Kreps, 563 F.2d 11052, 1056 (1st Cir. 1977) ("[Secretary's] reasoning [must] appear with sufficient clarity in the record for a court to review [Secretary's compliance with Congressionally declared standards and objectives])."

1. **The Addition of the Bellingham port.**

No party to this proceeding has cited a single page in the administrative record that shows **any** analysis by the Secretary regarding what impact adding Bellingham as a primary port would have on the IFQ program. The Alliance, the Government, the Intervenors and the District Court argued with each other about the impact the change would have on the enforcement mechanism originally presented to the Secretary by the Council, and we disagreed about whether the changes ultimately required in the enforcement mechanism would render it ineffective. Yet the Secretary did not examine these potential impacts before amending the program. In fact, in the preamble to the final rule, the Secretary stated that there would be no change in enforcement from the proposed to the final rule. ER-II, tab 26 at 590381.[3]

2. **The allocation of quota shares.**

The District Court concluded that the Secretary allocated QS to vessel owners because of "administrative convenience." This rationale appears no where in the record. Hudson Transit Lines, Inc. v. U.S.I.C.C., 765 F.2d 329 (C.A.D.C. 1985) ("reviewing court may not supply basis for agency's decision." Instead, the record acknowledges that this decision was made "to award investors." [sic] ER-II, tab 26 at 59380.

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[3] This proved to be untrue. The Council has changed the enforcement mechanism. Government's Brief at 29.

In fact, the rule did not reward all of the "investors," it rewarded only vessel owners and lessees. The rule ignored captains and crew, who also were investors in the fishery. As the Alliance pointed out to the District Court, hired skippers and crew were "partners" with vessel owners in each season's fishing venture. They share costs and profits. If there were no profits, they received nothing for their labors. ER-I, tab IV, Ex. C. at 2-3, Ex F at 2, Ex. H at 3-4.

National Standard 4 requires a "fair and equitable [allocation] to all fishermen." 50 C.F.R. § 602.10(a)(3). The Alliance argued the Secretary could not reasonably have determined that the IFQ program is consistent with National Standard 4. An analysis of the largest allocations by the Anchorage Daily News indicates that the Alliance was right.[4] It reported that a mere forty vessel owners received harvest rights valued at $100 million. Sixth place in the halibut list was a group of Anchorage lawyers. As Larry Cotter, a member of the Council who voted in favor of the IFQ plan, noted "[a] lot of [small boat fishermen] . . . cannot have a viable fishery. Addendum 1 at 2.

The Government describes the District Court's oral "tentative decision" and Order as an explanation and "written response" to the arguments posed by the Alliance in the court below. Government's brief at 5. The District Court's decision provides little or no legal analysis. Instead, it

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[4] A court may consider information subsequent to a decision if it bears directly upon the plausibility of predictions made in promulgatory regulations. Sea Watch International v. Mosbacher, 762 F.Supp. 370, 381 (D.D.C. 1991).

addresses arguments presented by the Alliance summarily, glibly and dismissively. The District Court talked about "flying unicorns" and "red herrings." It accused NMFS chief enforcement officer of wanting "to have the entire United States Navy available for his enforcement." There was no thoughtful analysis of the Secretary's review and action.

3. The conflict of interest within the Council.

In adopting the Council's recommendations, the Secretary overlooked a critical aspect of the Council's deliberative process: namely, that a serious conflict of interest existed on the Council, given membership on the Council by individuals who had a clearly defined and sizable economic stake in the outcome.

Alliance recognizes that the Magnuson Act allows Council members to be individuals who by reason of their occupational or other experience are knowledgeable about fisheries management issues. 16 U.S.C. 1852(b)(2)(A). However, when Council members' financial interests are intimately intertwined with proposals by the Council to the Secretary, the public arguably has a right to expect such members to recuse themselves. Without such a recusal, the Secretary at least should recognize such a conflict taints the process. He should articulate, or at least examine, whether, in order to preserve fundamental fairness in the process, he should remand to the Council for further consideration.

In the context of the IFQ plan, the Secretary promulgated regulations which were tainted in the extreme by the self-interest of the very Council members who

recommended the regulations. Such an obvious conflict of interest constitutes a procedural irregularity at the Council level. The Secretary's ignoring of this procedural irregularity renders the Secretary's decision to promulgate the regulations arbitrary and capricious. This Court has recognized that "[i]n order for a court to overturn a Secretary's decision, it must be shown that alleged irregularities . . . affected such decision." Alaska Factory Trawlers Association, et. al. v. Malcolm Baldridge, 831 F.2d 1456, 1460 (9th Cir. 1987). Clearly, the six out of seven Council members who had a serious economic stake in the plan voting for the plan (and four out of five members with no economic interest voting against the plan), there is a good reason to believe the irregularities affected the Council's vote which, in turn, affected the Secretary's decision.

Given that "the Court, in passing on the validity of the regulations, must review the plan to the extent necessary to determine whether the Secretary abused her discretion in making her finding", Washington Trollers Association v. Kreps, 466 F.Supp. 309, 312 (W.D. Wash., 1979), it is only appropriate that this Court consider this conflict of interest.

APPENDIX 10 - Petition for Rehearing and Suggestion of Rehearing En Banc at 13-15, dated July 8, 1996.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 95-35077

ALLIANCE AGAINST IFQS; et al.;
Plaintiffs - Appellants;

v.

RONALD H. BROWN; Secretary of Commerce, et. al.;
Defendants - Appellees;
and
PETER M. KNUTSEN; et. al.;
Defendant - Intervenors - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ALASKA
THE HONORABLE JAMES K. SINGLETON, JR., JUDGE

PETITION FOR REHEARING AND SUGGESTION OF
APPROPRIATENESS OF REHEARING EN BANC

III. The Ninth Circuit should apply a "less deferential" standard of review.

As described above, the Secretary ignored a host of deadlines imposed by the statute. *See infra* at 4-5. National Marine Fisheries Service has described statutory limits as imposing a "rigid schedule." The Secretary has no discretion to alter or ignore these time limits. The Secretary's action invalidates the rule.

Furthermore, the Ninth Circuit has recognized and applied a standard "less deferential" than the "reasonableness" standard, where those with discretion to implement a program operated under a conflict of interest and benefited directly from their own actions. *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1322 (9th Cir. 1995). This heightened standard of review is appropriate where the decision would affect the individual decision maker financially. *Id.*, citing *Fielding v. International Harvesters*, 755 F.2d 708 (9th Cir. 1985). Here, Council members who would benefit directly, developed the program and the implementing regulations. *See* p. 4, *infra*.

With regard to the IFQ program, not only a conflict of interest justifies heightened scrutiny. The Magnuson Act precludes the Secretary of Commerce from designing or modifying any limited access plans submitted by a council for review. If the court's review is limited as well, there is, in effect, no review of limited access plans. No one protects fishermen from self-dialing.

The Panel struggled in this "troubling case," to uphold a plan which, in the Panel's own words,

> will undoubtedly have an adverse impact on the lives of many fishermen who have done nothing wrong. Their entire legitimate interest in making a living from the fishery has been sacrificed to an administrative judgment about conservation[1] of fish and efficiency of the industry. That is, however, an avoidable consequence of the statutory scheme. Despite the harshness to the fishermen who were left out, there is no way we can conclude on the record that the Secretary lacked a rational basis for leaving them out.

Alliance, ___ F.2d at ___, slip op. at 6115 (footnote added).

If the court had not deferred to the Secretary's judgment, but, instead, had applied a less deferential standard, the Court would likely have done what the Magnuson act required: it would have invalidated the present plan and sent it back to the Council and Secretary to develope one that was fair and equitable to all fishermen.

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1 The Alliance notes that conservation of the fisheries was not a consideration relied upon by the Council or the Secretary in developing or reviewing the IFQ program. In fact, neither the halibut nor sablefish fisheries were threatened before the program began. Furthermore, the IFQ program continues an "attack" fishery, and the same number of fish are caught as were caught under the previous, race-for-fish program. The goal of the IFQ program was to limit investment -- thus, the plan was all about money, not conservation.

APPENDIX 11 - 16 U.S.C. 1855(f)(1).

(f) JUDICIAL REVIEW.--

(1) Regulations promulgated by the Secretary under this Act and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of title 5, United States Code, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable, and

(A) section 705 of such title is not applicable, and

(B) the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

APPENDIX 12 - Plaintiff Alliance Against IFQs' Consolidated Reply To Defendants' And Intervenors' Oppositions To Plaintiffs' Motion For Summary Judgment And Plaintiffs' Opposition To Defendants' And Intervenors' Cross-Motions For Summary Judgment at 6-7, dated August 26, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALLIANCE AGAINST IFQS, et al. Plaintiffs,	)
v.	) No. A93-480 CV (JKS)
RONALD H. BROWN, Secretary of Commerce, et al., Defendants.	) PLAINTIFF ALLIANCE AGAINST IFQS' CONSOLIDATED REPLY TO DEFENDANTS' AND INTERVENORS' OPPOSITIONS TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' OPPOSITION TO DEFENDANTS' AND INTERVENORS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

While plaintiffs do not suggest unprincipled behavior by the decision-makers here, the record does support a picture of compromises of Rube Goldberg complexity among contending groups, the result of which is a rule which fails to achieve any of its significant goals.

APPENDIX 13 - 16 U.S.C. 1852(j)(6).

(j) DISCLOSURE OF FINANCIAL INTEREST AND RECUSAL.--...

(6) The participation by an affected individual referred to in paragraph (1)(A)(ii) in an action by a Council during any time in which that individual is not in compliance with the regulations prescribed under paragraph (5) may not be treated as cause for the invalidation of that action.

APPENDIX 14 - 50 C.F.R. 602.14(c)(3)(i)(A).

§602.14 National Standard 4--Allocations.

. . .

(c) *Allocation of fishing privileges....*

(3) *Factors in making allocations...*

(i) *Fairness and equity.* (A) An allocation of fishing privileges should be rationally connected with the achievement of OY or with the furtherance of a legitimate FMP objective. Inherent in an allocation is the advantaging of one group to the detriment of another. The motive for making a particular allocation should be justified in terms of the objectives of the FMP; otherwise, the disadvantaged user groups or individuals would suffer without cause. For instance, an FMP objective to preserve the economic status quo cannot be achieved by excluding a group of longtime participants in the fishery. On the other hand, there is a rational connection between an objective of harvesting shrimp at their maximum size and closing a nursery area to trawling.

APPENDIX 15 - 50 C.F.R. 602.14(c)(3)(i)(B).

§602.14 National Standard 4--Allocations.

. . .

(c) *Allocation of fishing privileges....*

(3) *Factors in making allocations...*

(i) *Fairness and equity....*

(B) An allocation of fishing privileges may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups. An allocation need not preserve the status quo in the fishery to qualify as *fair and equitable*, if a restructuring of fishing privileges would maximize overall benefits. The Council should make an initial estimate of the relative benefits and hardships imposed by the allocation, and compare its consequences with those of alternative allocation schemes, including the status quo. Where relevant, judicial guidance and government policy concerning the rights of treaty Indians and aboriginal Americans must be considered in determining whether an allocation is fair and equitable.

APPENDIX 16 - 57 Fed. Reg. 57139 (Dec. 3, 1992).

3. Catcher vessel IFQ may be used on a freezer vessel, providing no frozen or otherwise processed fish products are on board at any time during a fishing trip on which catcher vessel IFQ is being used. This provision is intended to enhance opportunities for IFQ crew members. The Council assumed that most IFQ crew members who enter the fishery by purchasing QS would purchase catcher vessel QS because those QSs would be in greater supply and potentially less expensive than freezer vessel QS. However, the Council did not want to enhance opportunities to process fish of any species offshore and thereby deprive shore-based plants the opportunity to process those fish. Therefore, when catcher vessel QS is used on board a freezer vessel, all fish of any species would have to be landed as unprocessed product. Processing of IFQ species harvested with catcher vessel QS would not be allowed on board the vessel using those QSs. The reverse situation, using freezer vessel IFQ on a catcher vessel, would not be allowed. Moreover, a catcher vessel would not be allowed to land any IFQ species as frozen or otherwise processed product.

. . . .

APPENDIX 17 - Brief of Points and Authorities in Support of Alliance Against IFQs' Motion for Summary Judgment at 65-67, dated June 17, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALLIANCE AGAINST IFQS, et al. Plaintiffs,	)
v.	) No. A93-480 CV (JKS)
RONALD H. BROWN, Secretary of Commerce, et al.,	) BRIEF OF THE POINTS) AND AUTHORITIES IN) SUPPORT OF THE
Defendants.	) ALLIANCE AGAINST) IFQS' MOTION FOR) SUMMARY JUDGMENT

The regulations provide that initial allocation of QS will be given only to vessel owners and lease holders whose vessels landed sablefish or halibut during the qualifying years of 1988-1990. Thus a person who fished for sablefish or halibut every single year as a crew member or skipper would be completely excluded from receiving any of the fruits of his labor in the form of QS allocation. A person who merely owned his vessel, however, which was used entirely by a hired skipper and crew members, would receive credit for the fish caught by the skipper and crew in the form of QS for all the landings of that vessel, even though crew have traditionally been entitled to a percentage of the fish caught as compensation for their effort. The person who invested capital is thus rewarded by receipt of a piece of the fishery; the person who investor labor receives nothing.

The Council and NMFS justified this decision on the basis of a distinction between capital and labor, with no explanation of how such a distinction relates to the factors of present participation in the fishery and historical fishing practices and dependence on the fishery. In response to comments in the preamble to the final rule, NMFS defended its decision by stating that the Council chose vessel ownership or lease as a criterion because of the financial risk that such persons assume and the fact that these are the persons who decide whether to enter or exit a fishery and so affect the amount of capital in a fishery. AR 1a-26, page 59,3485.[13] Presumably, this was important to the Council

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13 The rationale of "financial risk" is severely diluted for lease holders whose temporary lease does not constitute a capital investment and who receive a percentage of the catch, much like a crew member.

because overcapitalization of the fishery had been identified as the primary source of other problems. By allocating QS only to vessel owners, it was hoped that less efficient vessel owners would sell QS to more efficient vessel owners and fishermen, thereby "rationalizing" the fishery in economic terms and reducing the size of the fleet. As discussed in the FEIS, however, this result is unlikely to occur because of the social engineering measures in the plan. AR 4-43, pages 2-52 and 2-53. The rationale, then, for awarding QS only to vessel owners and leaseholders is flawed at the outset and provides no basis for excluding crew members and hired skippers, whose historical dependence on the fishery is at least as great as that of vessel owners.

APPENDIX 18 - Final Environmental Impact Statement/Environmental Impact Statement for the Individual Fishing Quota Management Alternative for Fixed Gear Sablefish and Halibut Fisheries, Gulf of Alaska and Bering Sea/Aleutian Islands, September 15, 1992 at 2-23.

2.3.3 The initial distribution of quota shares

The amount of the initial halibut (sablefish) quota shares for an area assigned to each person will equal the halibut (sablefish) landings for the person's best five years of 1984 through 1990 (1985 and 1990) for that area. The historical landings of a vessel will be counted as the lease holder's if there is one; otherwise, they will be counted as the vessel owner's. This will be done on a trip by trip basis. The initial assignment of quotas shares to each person by vessel class will be based on the vessel class used in the most recent year through September 25, 1991. Specifically, if a vessel is determined to be in a specific class and that vessel was used in the most recent year of participation by the owner or lease holder, then all qualifying pounds credited to that person during the qualifying years shall be assigned to that vessel class. However, if the owner or lease holder participated in the most recent year using vessels in more than one vessel class, qualifying pounds will be assigned to separate vessel classes in proportion to the landings made with each vessel class.

The beginning year of each of these catch history periods was selected to assure that the initial distribution of QSs reflected the long-standing participation and dependence on

the fisheries. Many of those with five or more years of landings would have received IFQs in 1991 that were at least 80% of their average annual landings.

There are two reasons why the end of the qualifying periods is 1990. First, extending it beyond that would have provided an incentive both for additional fishermen to enter the fishery and for previous entrants to adopt extreme fishing methods in order to increase their landings and, therefore, the QSs they would receive if an IFQ program is implemented. This speculative activity would have intensified the race for fish and imposed substantial costs on the fishery in 1991. Second, it would have made it more difficult for a person to calculate what his QS and IFQ would be by area for each of the alternatives being considered.